No. 964

In the Supreme Court of the United States

OCTOBER TERM, 1944

IN THE MATTER OF ROBERT D. MICHAEL, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The majority (R. 129–134) and dissenting (R. 134–140) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 16, 1944 (R. 140). The petition for a writ of certiorari was filed February 20, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13, 1925 (Pet. 3).[1]

QUESTIONS PRESENTED

1. Whether the evidence supports the finding that petitioner was guilty of contempt before the grand jury.

2. Whether the judgment is void because it failed to recite that it was based on a finding of guilty beyond a reasonable doubt.

3. Whether petitioner's conviction was based upon incompetent evidence.

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[1] In *United States ex rel. Brown* v. *Lederer*, 139 F. 2d 861, the Circuit Court of Appeals for the Seventh Circuit held that by virtue of the Act of November 21, 1941, c. 492, 55 Stat. 776, 18 U. S. C. 689, extending the authority of this Court under 18 U. S. C. 687 and 688 to promulgate rules of procedure in criminal cases to cover proceedings to punish for criminal contempt, the Criminal Appeals Rules automatically became applicable to such proceedings. In this view the petition for certiorari is out of time. However, it is our position that the Criminal Appeals Rules do not apply in the absence of an order by this Court extending them to appeals in contempt proceedings, and we therefore do not contest the timeliness of the petition.

In addition, it is to be noted that petitioner's appeal to the circuit court of appeals was taken by notice of appeal (see R. 2), rather than by application for allowance of appeal, as required by Section 8 (c) of the Judiciary Act of February 13, 1925, 28 U. S. C. 230. See *Nye* v. *United States*, 313 U. S. 33, 43–44. However, on October 2, 1944, within three months from the date of the judgment of the district court, the circuit court of appeals admitted petitioner to bail pending disposition of his appeal (R. 2, 92–93, 127–128). For the purpose of conferring jurisdiction upon the circuit court of appeals we do not dispute that this constituted sufficient compliance with the technical requirements of Section 8 (c).

STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C. 385) provides in part as follows:

> The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, * * * and the disobedience or resistance by any * * * witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

On September 14, 1944, upon direction of the grand jury in session in the United States District Court of the Middle District of Pennsylvania (R. 94–95), a petition was filed before a judge of that court for a rule to show cause why petitioner, a witness before the grand jury, should not be held in contempt. The petition alleged that, in the course of an inquiry into alleged frauds against the United States, the grand jury was investigating the reorganization proceedings of the Central Forging Co. of Catawissa, Pennsylvania, of which petitioner had been appointed trustee by the district court; that petitioner was called as a witness before the grand jury and gave obstruc-

tive, evasive, perjurious, and contumacious answers to questions propounded to him, and obstructed the investigation of the grand jury. (R. 3–9.) An order to show cause was issued (R. 9–10), petitioner filed an answer (R. 14–19),[2] and a hearing was had at which testimony of various witnesses was taken and petitioner's testimony before the grand jury was introduced in evidence.

The evidence introduced by the Government may be summarized as follows:

Petitioner, as trustee in reorganization of the Central Co., discussed with Harry S. Knight, the attorney for the Maxi Manufacturing Co., a creditor, a plan whereby the assets of Central would be transferred to Maxi for approximately $25,000 (R. 69, 119). In discussing the proposed plan with Hervey Smith, the attorney for one of the other creditors, petitioner and his attorney, Reifsnyder, advised Smith that if he would induce his client to accept the plan, $500 would be paid to him (R. 114, 115). When it appeared that the proposed plan would be accepted by the creditors, petitioner, Reifsnyder, and Knight discussed the fees that probably would be allowed in the proceeding, and petitioner and Reifsnyder expressed dissatisfaction with the amount they would probably receive. It was then suggested that the value

[2] Petitioner also filed a petition for a bill of particulars (R. 10–11) and a motion to quash the rule (R. 13), both of which were denied (R. 12, 14).

of the assets of Central be fixed at $3,000 less than the amount previously agreed upon and that such sum be paid to petitioner by the Maxi Co. (R. 97–100.) This p[illegible] was consummated, and on April 24, 1942, the date of the transfer of the assets of Central, Maxi paid $3,000 to an attorney, George Fenner, who endorsed the check and left it with the petitioner and Reifsnyder, receiving $500, the amount agreed upon as the sum he would be required to pay as additional income tax (R. 106–107, 109–112). In petitioner's presence, Reifsnyder paid $500 to Hervey Smith on the same day (R. 115).

Homer Davis, treasurer of Maxi (R. 125), was, prior to the transfer of the assets of Central, employed as auditor and bookkeeper by petitioner in the latter's capacity as trustee of Central (R. 56, 57, 102). On April 10, 1942, petitioner told Davis that he needed "a large amount of money," $2,000; that "in cases of the kind that we were in it was necessary to spread a little oil" (R. 102). Davis asked whether he should prepare a check payable to petitioner for that amount, and the latter replied that there should be several checks payable to "cash" and that Davis should prepare one payable to himself and should enlist the help of Max Long, president of Maxi (R. 125), who was also employed by petitioner in his capacity as trustee (R. 59), and prepare another check payable to Long (R. 102). Davis then prepared

such checks for petitioner's signature as trustee of Central, and petitioner took them, stating that he would have them countersigned by John Crolly, the referee in bankruptcy; that "he didn't believe John Crolly would know what he was signing" (R. 102–103). The checks thus prepared by Davis consisted of two in the sum of $600 each, drawn to the order of Davis and Long, respectively, and three payable to "cash" in the sums of $450, $250, and $300 (R. 104; Gov. Ex. 5, R. 120–124). On April 16, 1942, petitioner telephoned Davis and stated that he was sending the checks by messenger and on the following morning, April 17, the messenger appeared with the checks (R. 103), which had in the meantime been signed by petitioner and countersigned by Crolly (R. 105, 120–124). Davis then secured Long's endorsement and cashed all five of the checks (R. 104). After taking out $200 previously agreed upon as covering his and Long's additional income taxes, Davis turned over $2,000 to the messenger (R. 105–106).

In his testimony before the grand jury, petitioner denied that there was any discussion of a reduction of the value of the assets of Central for the purpose of enabling him and his attorney to obtain additional fees, denied any knowledge of the $3,000 paid to Fenner by Maxi, and denied receipt of any additional fee other than that allowed by the court (R. 36, 53–54, 68, 73–77, 86,

88–89). He stated that Reifsnyder gave $500 to Hervey Smith out of the compensation allowed to Reifsnyder (R. 54, 78). As to the $600 checks payable to Davis and Long, petitioner admitted that he knew the payments were not for salaries, but stated that he could not remember the reason for the checks. He denied that he had received the proceeds of such checks. (R. 56–61.) At a later appearance before the grand jury, he testified that these checks might have represented bonuses to these men, although he did not authorize such bonuses (R. 84). Petitioner explained the checks drawn to "cash" merely as petty cash withdrawals. He had no explanation for the fact that all three of these checks were cashed on the same day as the Davis and Long checks. (R. 61–62, 64–66.) He denied ever discussing the five checks with Davis, denied telling Davis by telephone that he was sending a messenger with the checks, denied sending the messenger, and denied receiving the proceeds of the checks (R. 61–62, 64–66, 87–88). Petitioner also denied telling Davis that it was necessary to "spread a little oil" (R. 88).

At the close of the case, the trial judge stated orally that he was "convinced beyond a reasonable doubt" that petitioner was guilty of contempt, referring particularly to the $3,000 transaction and the five checks cashed on April 17. The judge further stated that he was convinced that peti-

tioner's testimony with reference to these transactions "was wilfully and deliberately false and was given with the wilful and deliberate intent to obstruct the Grand Jury in its inquiry, and this Court in the due administration of justice." (R. 116.)

Thereafter the judge entered a written "Judgment and Commitment" sentencing petitioner to six months' imprisonment; the judgment recited that petitioner, having been duly sworn as a witness and questioned before the grand jury concerning matters relevant and material to its inquiry, had given "false and evasive" testimony, and that "the false and evasive testimony * * * obstructed the said Grand Jury in its inquiry and the due administration of justice" (R. 92–93).

On appeal, the judgment of the district court was affirmed (R. 140), one judge dissenting (R. 134–140).

ARGUMENT

1. The district court and all three judges of the circuit court of appeals were agreed that petitioner's testimony before the grand jury was knowingly false in respect of material matters (R. 92–93, 131–132, 136), and petitioner does not here challenge that finding. He contends, however (Pet. 4, 5, 8–12, 14–15), that his false testimony was not of such a character as to justify his conviction for contempt.

The legal principles governing the question whether perjury may be treated as contempt are well settled, and both the majority and the dissenting judges in the circuit court of appeals agreed in their statement of those principles (cf. R. 132–133 with R. 136–137). Perjury alone is not contempt, but perjury which tends to block the inquiry or to hinder the court in the performance of its functions does constitute contempt. *Ex parte Hudgings*, 249 U. S. 378, 382–384; *Clark* v. *United States*, 289 U. S. 1, 11. The division of opinion in the circuit court of appeals was merely on the question whether the perjury here proved would have such a tendency "to block the inquiry."

We submit that the majority of the circuit court of appeals was correct in upholding the finding of the district judge that petitioner's perjurious testimony "obstructed the said grand jury in its inquiry and the due administration of justice" (R. 92–93; see also R. 116). As the majority pointed out (R. 134), petitioner's testimony in response to questions as to the batch of checks cashed on April 17, amounting in all to $2,200 (see *supra*, pp. 5–6, 7), was just as obstructive to the grand jury's investigation as an attempt to destroy the checks would have been. Petitioner gave vague and misleading explanations for the payments of $600 each to Davis and Long and failed to explain the cash withdrawals totaling

$1,000 other than as "petty cash" (see *supra*, p. 7). His explanation that he could not remember the exact purposes for which the checks were drawn because he signed approximately 150 checks a week (R. 66), was disingenuous. In a reorganization proceeding a trustee appointed by the court, who has the duty to account to the court, does not lightly authorize the withdrawal of $1,000 in cash on one day and the payment of $1,200 to two employees for some unknown purpose on the same day as a routine matter. We think that the opinion of the dissenting judge below is based upon a failure to appreciate the extraordinary nature of such a transaction and a misconception of the effect of petitioner's testimony in respect thereto on the course of the grand jury's investigation (see R. 137). There was evidence at the trial (see *supra*, pp. 5–6), and apparently also before the grand jury (see R. 88), that petitioner withdrew $2,000 designedly for the purpose of "spreading a little oil." The use to which petitioner put that money was a very pertinent point of inquiry by the grand jury, since it might have revealed the identity of other persons implicated in the fraudulent scheme. Hence, when petitioner, who received the money, falsely testified that he had not received it, he very effectively balked investigation by the grand jury as to the purpose of the withdrawals and the manner in which he disposed of the money. He

thus hindered the grand jury from obtaining important and relevant evidence. Similarly, petitioner's denial of any knowledge of the transaction by which the value of the assets of the Central Forging Co. was reduced, and his denial of the receipt of any part of the $3,000 paid to Fenner (*supra*, pp. 4–5, 6), was more than mere perjury. There was a possible inference from the testimony as a whole that not all of the $2,500 which petitioner and Reifsnyder received from the transaction was retained by them. Petitioner's bland denial of the whole transaction, which was proved to be false, prevented further inquiry into the disposition of this money.

Certainly the fact that petitioner's answers were not on their face contumacious, evasive, or unresponsive does not relieve him of liability for contempt. So to hold would be to reward skill in the art of lying. Petitioner's ready falsehoods were just as effective a block to the grand jury's inquiry as the more obvious evasiveness established in the cases cited by the dissenting judge below (R. 137–139). Since, as two courts have justifiably found, petitioner's testimony was not only false but was also a deliberate barrier to further significant inquiry by the grand jury, petitioner was properly adjudged guilty of contempt.

2. There is no merit in petitioner's contention (Pet. 12) that the judgment of conviction is void because it does not contain an express statement

that it was based upon a finding of guilt beyond a reasonable doubt. Petitioner does not contend that the trial judge did not in fact find him guilty beyond a reasonable doubt, for the judge himself so stated orally at the close of the trial (R. 116); petitioner argues merely that such a finding must be included in the judgment. That the trier of fact in a contempt proceeding must be convinced of guilt beyond a reasonable doubt is, of course, established, but the ultimate judgment in the case is either guilty or innocent. There is no more reason to include a statement as to conviction beyond a reasonable doubt in a judgment entered after a trial by a court than there is in a judgment entered after a trial by jury.

3. Petitioner asserts generally that the trial judge admitted "incompetent evidence" (Pet. 13), but does not specify the evidence to which he objects and has not included his objections in the printed record. Presumably, one of the exhibits to which he refers as "letters written by other persons and delivered to other persons" (Pet. 13) is Government's Exhibit G-2 (R. 117–118), a letter written by Knight to Davis containing a resumé of Knight's conference with petitioner and Reifsnyder at which the $3,000 reduction in the sale price of Central's assets was arranged (see *supra*, pp. 4–5). The letter contained the same information as was testified to by Knight directly (R. 96–99) and was therefore merely cumulative.

We submit that the circuit court of appeals was clearly correct in holding (R. 131):

> We find nothing in the court's action here which results in prejudice to the accused. The trial judge accepted the evidence so that he could get the whole picture and we have every confidence in his ability and desire to weed out the relevant from the irrelevant when it came to determining the weighing of the testimony against the accused.[3]

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
WILLIAM STRONG,
Attorneys.

MARCH 1945.

[3] The dissenting judge agreed that there was no error in the admission of evidence (R. 134).

U. S. GOVERNMENT PRINTING OFFICE: 1945